

# SENATE BILL No. 427

## DIGEST OF INTRODUCED BILL

**Citations Affected:** IC 5-14-1.5-6.1; IC 8-1-1-5; IC 8-1-2.

**Synopsis:** IURC communications and deliberations. Amends the open door law to permit the utility regulatory commission (IURC) to deliberate rate cases in executive session. Prohibits a commissioner, an administrative law judge, or an employee or agent of the IURC who is assigned to a proceeding from communicating with a party to the proceeding unless the party files a notice of the communication with the IURC. Allows the IURC to impose a civil penalty of up to \$2,000 if a public utility fails to comply with a: (1) standard of service established by IURC rule; or (2) rate or service requirement of an IURC order. Allows the IURC to impose an additional penalty of up to \$4,000 if it finds that the violation demonstrates a willful disregard by the public utility of its duty to remedy the failure. Exempts commercial mobile service, rural electric membership corporations, rural telephone cooperatives, and local telephone companies serving less than 50,000 lines from the penalties. Specifies that a suit to recover a penalty must be brought by the attorney general. Provides that merchant power plants are subject to the jurisdiction of the IURC. Requires the IURC to notify the local zoning authority of a petition for approval of a merchant power plant. Requires the IURC to consider any land use plan or other information provided by the zoning authority.

**Effective:** Upon passage; July 1, 2002.

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January 10, 2002, read first time and referred to Committee on Commerce and Consumer Affairs.



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Introduced

Second Regular Session 112th General Assembly (2002)

PRINTING CODE. Amendments: Whenever an existing statute (or a section of the Indiana Constitution) is being amended, the text of the existing provision will appear in this style type, additions will appear in **this style type**, and deletions will appear in ~~this style type~~.

Additions: Whenever a new statutory provision is being enacted (or a new constitutional provision adopted), the text of the new provision will appear in **this style type**. Also, the word **NEW** will appear in that style type in the introductory clause of each SECTION that adds a new provision to the Indiana Code or the Indiana Constitution.

Conflict reconciliation: Text in a statute in *this style type* or ~~this style type~~ reconciles conflicts between statutes enacted by the 2001 General Assembly.

## SENATE BILL No. 427

A BILL FOR AN ACT to amend the Indiana Code concerning utilities and transportation.

*Be it enacted by the General Assembly of the State of Indiana:*

- 1 SECTION 1. IC 5-14-1.5-6.1, AS AMENDED BY P.L.37-2000,  
2 SECTION 1, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE  
3 JULY 1, 2002]: Sec. 6.1. (a) As used in this section, "public official"  
4 means a person:  
5 (1) who is a member of a governing body of a public agency; or  
6 (2) whose tenure and compensation are fixed by law and who  
7 executes an oath.  
8 (b) Executive sessions may be held only in the following instances:  
9 (1) Where authorized by federal or state statute.  
10 (2) For discussion of strategy with respect to any of the following:  
11 (A) Collective bargaining.  
12 (B) Initiation of litigation or litigation that is either pending or  
13 has been threatened specifically in writing.  
14 (C) The implementation of security systems.  
15 (D) The purchase or lease of real property by the governing  
16 body up to the time a contract or option to purchase or lease is  
17 executed by the parties.

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However, all such strategy discussions must be necessary for competitive or bargaining reasons and may not include competitive or bargaining adversaries.

(3) For discussion of the assessment, design, and implementation of school safety and security measures, plans, and systems.

(4) Interviews with industrial or commercial prospects or agents of industrial or commercial prospects by the department of commerce, the Indiana development finance authority, the **Indiana** film commission, the Indiana business modernization and technology corporation, or economic development commissions.

(5) To receive information about and interview prospective employees.

(6) With respect to any individual over whom the governing body has jurisdiction:

(A) to receive information concerning the individual's alleged misconduct; and

(B) to discuss, before a determination, the individual's status as an employee, a student, or an independent contractor who is a physician.

(7) For discussion of records classified as confidential by state or federal statute.

(8) To discuss before a placement decision an individual student's abilities, past performance, behavior, and needs.

(9) To discuss a job performance evaluation of individual employees. This subdivision does not apply to a discussion of the salary, compensation, or benefits of employees during a budget process.

(10) When considering the appointment of a public official, to do the following:

(A) Develop a list of prospective appointees.

(B) Consider applications.

(C) Make one (1) initial exclusion of prospective appointees from further consideration.

Notwithstanding IC 5-14-3-4(b)(12), a governing body may release and shall make available for inspection and copying in accordance with IC 5-14-3-3 identifying information concerning prospective appointees not initially excluded from further consideration. An initial exclusion of prospective appointees from further consideration may not reduce the number of prospective appointees to fewer than three (3) unless there are fewer than three (3) prospective appointees.

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Interviews of prospective appointees must be conducted at a meeting that is open to the public.

(11) To train school board members with an outside consultant about the performance of the role of the members as public officials.

(12) To prepare or score examinations used in issuing licenses, certificates, permits, or registrations under IC 15-5-1.1 or IC 25.

**(13) To discuss a public utility rate case.**

(c) A final action must be taken at a meeting open to the public.

(d) Public notice of executive sessions must state the subject matter by specific reference to the enumerated instance or instances for which executive sessions may be held under subsection (b). The requirements stated in section 4 of this chapter for memoranda and minutes being made available to the public is modified as to executive sessions in that the memoranda and minutes must identify the subject matter considered by specific reference to the enumerated instance or instances for which public notice was given. The governing body shall certify by a statement in the memoranda and minutes of the governing body that no subject matter was discussed in the executive session other than the subject matter specified in the public notice.

(e) A governing body may not conduct an executive session during a meeting, except as otherwise permitted by applicable statute. A meeting may not be recessed and reconvened with the intent of circumventing this subsection.

SECTION 2. IC 8-1-1-5 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2002]: Sec. 5. (a) The commission shall in all controversial proceedings heard by it be an impartial factfinding body and shall make its orders in such cases upon the facts impartially found by it. The commission shall in no such proceeding, during the hearing, act in the role either of a proponent or opponent on any issue to be decided by it. All evidence given in any such proceeding shall be offered on behalf of the respective parties to, or appearing in, the proceeding and not in the name or behalf of the commission itself.

(b) Any report, audit, examination, or analysis prepared by the commission staff **or an agent of the commission** at the request or direction of the commission may be made a part of the record of the proceeding, subject to cross-examination by any party of the person who performed or directed the preparation of the report, audit, examination or analysis. **Any report, audit, examination, analysis, or recommendation that:**

**(1) is prepared by the commission staff or an agent of the commission and communicated to the commission or an**

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administrative law judge;

(2) concerns an issue of fact or law in an adjudicatory proceeding; and

(3) is not made part of the record of the proceeding;

must be served by the commission or an administrative law judge on all parties to the proceeding not less than ten (10) days before a final order is issued in the proceeding.

(c) If in any such proceeding the public interest is not otherwise adequately represented by counsel, in the opinion of the commission, it shall be the duty of the utility consumer counselor, if requested by the commission, to make adequate preparation for the presentation of the interests of the public in such proceeding and ~~he~~ **the utility consumer counselor** shall at the hearing represent the public interests therein involved.

(d) However, nothing in this section prevents the commission from instituting, prosecuting, hearing, or determining any investigation or proceeding which it is authorized to do, or make, on its own motion by any law with the administration of which it is charged.

(e) ~~Except as otherwise provided in this chapter, no member or A commissioner, an administrative law judge, a staff employee of the commission, or an agent of the commission assigned to make findings of fact and conclusions of law in a formally docketed evidentiary proceeding may not communicate in connection with any issue of fact, or law, or policy disputed in that proceeding with any party or his a party's representative, except on notice and with opportunity for all parties to participate: unless the party agrees to report the communication in the manner provided in this subsection, and regardless of whether the communication is initiated by the party or the party's representative or by the commissioner, administrative law judge, staff employee, or agent. A party shall report a communication described in this subsection not later than three (3) working days after the date on which the communication occurs by submitting a notice of ex parte communication to the administrative law judge or commissioner assigned to the proceeding and to the secretary of the commission for inclusion in the public record. A notice provided under this subsection must include the following information:~~

(1) The date, time, and location of the communication and whether it was oral, written, or oral and written.

(2) The identity of:

(A) all participants in the communication;

(B) the person initiating the communication; and

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(C) any other persons present during the communication.

(3) A description of the communication and a summary of the content of communication.

The party shall attach to the notice required under this subsection a copy of any written material or text used during the communication.

(f) A person who violates this section ~~commits a Class C infraction.~~ is subject to sanctions, disciplinary action, or other remedial action as follows:

(1) If the person is a party to a proceeding under this section and the person:

(A) directly or indirectly violates or causes the violation of this section; or

(B) fails to report to the commission the facts and circumstances concerning any violation of this section; the person, after notice and hearing, may be disqualified by the commission from further participation in the proceeding. In a proceeding other than a rulemaking proceeding, the commission may require the person to show cause why the person's claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected. In any proceeding, the commission may impose any alternative or additional sanctions upon the person as the commission considers appropriate.

(2) If the person is a staff employee or an agent of the commission, the person is subject to any disciplinary or other remedial action that the commission considers appropriate.

(3) For all other persons, the commission may impose any sanctions or other remedial actions that the commission considers appropriate under the circumstances of the violation.

SECTION 3. IC 8-1-2-109 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2002]: Sec. 109. (a) This section does not apply to any of the following:

(1) The provision of commercial mobile service (as defined in 47 U.S.C. 332).

(2) A corporation covered by IC 8-1-13 or IC 8-1-17.

(3) A telephone company (as defined in section 88 of this chapter) that is certified for local exchange telephone service and that serves less than fifty thousand (50,000) local exchange access lines.

(b) This section does not apply when a public utility's failure to

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comply under subsection (e) is caused by any of the following:

- (1) Customer provided equipment.
- (2) The negligent act of a customer.
- (3) An emergency situation.
- (4) An unavoidable casualty.
- (5) An act of God.
- (6) Circumstances beyond the control of the public utility.

(c) As used in this section, "public utility" includes a public utility owned or held in trust by a consolidated city under IC 8-1-11.1.

(d) A public utility that violates this chapter, or fails to perform any duty enjoined upon it, for which a penalty is not otherwise provided, commits a Class B infraction; and every officer of a public utility shall comply with:

- (1) this chapter; and
- (2) each order or rule of the commission made under the authority of this chapter.

(e) Except as otherwise provided in this chapter, if the commission finds, after notice and hearing, that a public utility has failed to comply with:

- (1) a standard of service established by commission rule; or
- (2) a rate or service requirement of a final and unappealable order of the commission;

the commission may order the public utility to pay a civil penalty of not more than two thousand dollars (\$2,000) for each failure to comply.

(f) Notwithstanding subsection (e), if the commission finds, after notice and hearing, that the public utility's failure to comply demonstrates, by a continuing pattern of conduct, a willful disregard by the public utility of its obligation to remedy the failure found under subsection (e), the commission may impose an additional civil penalty of not more than four thousand dollars (\$4,000) for each failure to comply.

(g) The commission shall consider the following when determining the appropriateness of the imposition or amount of a civil penalty:

- (1) The size of the public utility.
- (2) The gravity of the failure to comply.
- (3) The good faith of the public utility in attempting to remedy the failure to comply or achieve compliance after receiving notification of the failure.
- (4) The effect of the civil penalty on the public utility's



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financial ability to provide adequate and reliable service.

(5) If the public utility is a nonprofit company:

(A) the effect of the penalty on the company's members and their capitalization of the company; and

(B) whether the act or omission causing the failure to comply had been approved or requested by the company's members.

In the order imposing the civil penalty, the commission shall make specific findings with respect to the factors described in subdivisions (1) through (5).

(h) A public utility may not be subject to both a civil penalty under this section and a negotiated penalty under a commission approved settlement agreement for the same failure to comply. If the commission has approved a settlement agreement that includes penalties or remedies for noncompliance with specific provisions of the settlement agreement, the penalties provided in this section do not apply to those instances of noncompliance during the life of the settlement agreement.

SECTION 4. IC 8-1-2-115 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2002]: Sec. 115. (a) The commission shall inquire into any neglect or violation of the statutes of this state or the ordinances of any city or town by any public utility doing business therein, or by the officers, agents, or employees thereof, or by any person operating the plant of any public utility, and shall have the power, and it shall be ~~its~~ **the commission's** duty to enforce the provisions of this chapter, as well as all other laws, relating to public utilities. Any forfeiture or penalty provided in this chapter shall be recovered and suit therein shall be brought in the name of the state of Indiana ~~in the circuit or superior court where the public utility has its principal place of business; by the attorney general in a court having jurisdiction.~~ Complaint for the collection of any such forfeiture may be made by the commission or any member thereof, and, when so made, the action so commenced shall be prosecuted by the **attorney general.** ~~counsel.~~

(b) If the attorney general prevails in an action under this section, the attorney general may recover any of the following:

(1) The amount of a judgment, a forfeiture, a civil penalty, or another penalty.

(2) The attorney general's reasonable costs in maintaining the action.

SECTION 5. IC 8-1-2-128 IS ADDED TO THE INDIANA CODE AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE

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UPON PASSAGE]: Sec. 128. (a) This section does not apply to any of the following:

- (1) A corporation operating under IC 8-1-13.
- (2) A nonprofit corporation most of whose members are operating under IC 8-1-13.
- (3) A joint agency created and operating under IC 8-1-2.2.

(b) As used in this section, "merchant power plant" means a facility in Indiana used for the:

- (1) production of electric energy; and
- (2) sale of electric energy exclusively on the wholesale market to other public utilities, energy service providers, or power marketers in or outside Indiana.

(c) A merchant power plant is subject to the jurisdiction of the commission.

(d) For any petition filed by a merchant power plant under IC 8-1-2.5 or IC 8-1-8.5, the commission may consider the following:

- (1) Location of the merchant power plant.
- (2) Need for the electricity to be generated or other benefits to be provided by the merchant power plant.
- (3) Impact of the merchant power plant on electric, water, and natural gas suppliers and customers.
- (4) Financing for the merchant power plant.
- (5) Other factors the commission considers relevant.

SECTION 6. IC 8-1-2-129 IS ADDED TO THE INDIANA CODE AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 129. (a) Not later than seven (7) days after receiving a petition for the approval of a merchant power plant (as defined in section 128(b) of this chapter), the commission shall notify, by certified mail, the appropriate county or municipal agency having zoning jurisdiction in the area where a merchant power plant is proposed.

(b) The agency having zoning jurisdiction may, not later than thirty (30) days after receiving notification from the commission under subsection (a), forward to the commission the following information concerning the proposed location and impact of the merchant power plant:

- (1) Land use plans as identified in a comprehensive plan or applicable local zoning ordinances.
- (2) Other issues considered relevant to local officials.

In its consideration of the petition for approval of the merchant power plant, the commission shall consider any information



1 provided to it under this subsection.  
2 SECTION 7. An emergency is declared for this act.

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